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Opinions of the Attorney General

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OPINIONS OF THE ATTORNEY GENERAL

August 15, 1949

Mr. W. L. Eckes
City Attorney
Beach, North Dakota
Dear Sir:

Re: Transient Merchants — Hawkers and Peddlers

Yours of the 11th inst. re the above has been received and referred to my desk.

Regulation of transient merchants is provided for by chapter 51-04 N. D. R. C. 1943. Under this chapter both cities and villages, as well as the state, may license transient merchants. A transient merchant must have a state license before he can lawfully carry on his business. Whether or not he must have a village or city license also depends upon whether the village or city in which he is carrying on his business has by ordinance required such license. Having a state license does not exempt a transient merchant from the necessity of having a municipal license if one is required by the ordinance of the municipality.

Municipalities are given power to regulate or prohibit the business of hawkers and peddlers by section 40-0501 (26) N. D. R. C. 1943. There seems to be a confusion of thought relative to these two classes of businesses. Hawkers and peddlers are not transient merchants and transient merchants are not hawkers and peddlers.

Section 51-0401 of the 1947 Supplement specifically defines "transient merchant" as "one who engages in the vending or sale of merchandise at any place temporarily. . . ."

"A peddler, within the general accepted meaning of the word, is a small retail dealer, who carries his merchandise with him, traveling from place to place, and from house to house, exposing his goods for sale and selling them." McQuillin, 2d Ed. Rev. Vol. 3, p. 749 n. Since these businesses are clearly separate and distinct, a statute or ordinance designed to regulate one does not affect the other.

Clearly, under section 41-0501 (26) the municipality may not only regulate, but may prohibit the business of peddling within its limits, but it may not prohibit the business of a transient merchant. It may merely regulate and license it.

By statute relating to transient merchants "merchandise shall not include any agricultural product." And the statute giving municipalities power to regulate peddlers, the power does not apply to persons selling or offering to sell products raised or grown on land within this state.

The case of *State v. Fleming*, 24 N. D. 593, 140 N. W. 674, concerned a Missouri farmer who shipped a car load of apples raised by him in Missouri into North Dakota and sold them at retail from the freight car in which they were shipped. Our Court discusses the statute then in force, which did not contain the provision that merchandise shall not include any agricultural product. And the Court concluded that the sale of apples by the defendant did not constitute him a transient merchant. The opinion of

Attorney General Nels G. Johnson, referred to by you, is correct under the decision in this case.

A farmer selling the products of his farm by retailing them from a wagon within a city is not a hawker or peddler, as these terms are generally understood.

In re Snyder, 10 Idaho 687, 79 Pac. 819, 68 L.R.A. 708. See note in McQuillin 2nd Ed. Rev. Vol. 3, p. 584 n.

Order takers, that is, those who merely go around and solicit orders for merchandise delivered from out of the state later, are not transient merchants within the purview of chapter 51-04 N. D. R. C. 1943. A person who, as agent, merely solicits orders for goods for his principal, whether by sample or otherwise, is not a transient merchant, trader, or dealer.

City of Wausau v. Heideman, 96 N. W. 549, 550, 119 Wis. 244.

"Transient merchant" did not include a traveling solicitor for a corporation engaged in selling tea, who took orders for goods similar to samples carried by him, and who afterwards delivered the goods for the corporation, in case the orders were accepted, the corporation keeping the accounts with customers.

State v. Bristow, 131 Iowa 664, 109 N. W. 199.

For many definitions of "transient merchant" see 43 Words & Phrases, Permanent Edition, page 341.

We believe that all of your questions are answered herein.

Yours very truly,
Wallace E. Warner
Attorney General
By C. E. BRACE
Assistant Attorney General

September 15, 1949

McGee & McGee
Attorneys at Law
Minot, North Dakota
Gentlemen:

Your letter of September 14 addressed to the Attorney General has been received and contents noted.

You desire the opinion of this office as to whether the county as the owner of 50% of the mineral rights of land acquired by it through tax deed proceedings or otherwise may separately give a lease to a person or persons for the purpose of such mineral development, or in other words, can the county act without the owner of the other mineral rights joining.

The law was enacted in 1941 and is found in the Session Laws of that year as Chapter 136. Section 2 of the Act provides as follows:

"It is the intention of the Legislature in passing this act to reserve to the county one-half of all oil, natural gas, and/or minerals found on or under such land with the intention that the county may join with the owner of the other fifty per cent (50%) of such oil, gas or mineral rights

to make any standard or reasonable contract for the drilling, mining and/or production of oil, gas and minerals upon a royalty basis."

You will observe that the law provides that it is the intention that the county may join with the owner of the other 50% of such oil, gas, or mineral rights. The word "may" implies a choice on the part of the county and it would be my opinion that the county has a legal right to lease its interest to a third party even though the owner of the other 50% has assigned his interest to a party other than the third party. In other words, the county may lease its interest in the mineral to whom it may deem advisable and likewise the owner of the other 50% may assign his interest to any party regardless of any lease the county may have made to a different party. In other words, the county and the other owner may deal independently in leasing or otherwise disposing of their mineral rights.

Yours very truly,
Wallace E. Warner
Attorney General
By F. O. SATHRE
Assistant Attorney General



F. J. GRAHAM
PRESIDENT, STATE BAR ASSOCIATION
1949-1950